IN THE HIGH COURT OF BOMBAY AT GOA.

WRIT PETITION NO. 340 OF 2002.

Smt. Thereza Cordo,
major, widow of late
Tolentino Francisco Cordo,
housewife, resident of
Fottowaddo, Nerul, Bardez,Goa. .... Petitioner.

Versus

1. Venkatesh Lotlikar,
(deceased) through his legal heirs:
1. Shri Vishwanath V. Lotlikar,
2. Smt. Hira Vishwanath Lotlikar,
3. Shri Vijay Lotlikar,
4. Smt. Nalini Vijay Lotlikar,
5. Shri Suresh Venkatesh Lotlikar,
All residents of Nerul, Bardez, Goa.
6. Shri Dattaram Prabhuy Wadkar.
7. Smt. Smita Dattaram P. Wadkar.
8. Shri Bhagwant Raghuvir Dharwadkar,
(since deceased):
8a) Smt. Minabai B.Dharwadkar,
8b) Shri Shailesh B. Dharwadkar.
8c) Shri Shakil B. Dharwadkar.
Both residents of Porvorim, Bardez, Goa.
8d) Mrs. Shilpa Mahesh Lotlikar,
8e) Shri Mahesh Chandrakant Lotlikar,
Both residents of Mumbai.
8f) Mrs. Shanta Snajeev Nayak.
8g) Shri Sanjeev Nayak,
both residents of Margao, Goa.
9. Smt. Minabai Bhagwant Dharwadkar,
Respondents No.6 to 9 are residents
of Pomburpa, Bardez, Goa.
10. Shri Sadanand Y. Kamat Shankwalkar.
11. Smt. Suman Sadanand K. Shankwalkar
both residents of Panaji, Goa.
12. Shri Madhusudan Parshuram Prabhu
13. Smt. Madhavi Madhusudan Prabhu,
Respondents No.12 and 13, residents
of Canacona, Goa.

14. Shri Sadashiv S. Shanai Varde
Valaulikar.
15. Smt. Vibha S.V. Valaulikar,
Respondents No.14 and 15 are
residents of Bicholim, Goa.
16. Mamlatdar of Bardez Taluka,
Mapusa, Goa.
17. Addl. Collector,
North Goa Distric, Panaji, Goa.
18. Administrative Tribunal, Goa,
Panaji, Goa. .... Respondents.

Shir S.D. Lotlikar, Senior Advocate with Mrs. S. Rao and Mr. M. D'Souza, Advocates for the Petitioner.

Mr. M.S. Sonak with Mr. P. Rao, Advocates for the Respondents No.1 to 4.

CORAM: R.M.S. KHANDEPARKAR, J.

DATE: 8th SEPTEMBER, 2006.

ORAL JUDGMENT:

The petitioner challenges the Orders passed by the Mamlatdar of Bardez, the Additional Collector and the Administrative Tribunal in the proceedings arising under the Goa Mundkars (Protection from Eviction) Act, 1975 (hereinafter called the said Act).

2. One Venkatesh Vishwanath Lotlikar filed an application before the Mamlatdar of Bardez at Mapusa on 2nd May, 1984 requesting for registering himself as mundkar in respect of a house bearing Village Panchayat House No. 161 situated in the property bearing Survey No.49 sub-divisions 4 and 5 situated at Nerul, Bardez, Goa and claiming that

Agostino Henry Cordo alias Sunny Cordo of Alto Guirim to be the landlord and claiming to be occupying the said house over a period of 35 years. On receipt of the application, the Mamlatdar recorded verification of his claim on 4th May, 1984 in terms of the provisions of law comprised under the said Act and notice was issued to the said Agostino. On 31st May, 1984 on receipt of the said notice, Agostino filed his reply stating that he was the owner of the suit house and the same is situated in the property belonging to one Shri Tolentino Cordo who had expired leaving behind his widow the petitioner herein and four children. Consequent to the said disclosure in his reply, a notice was issued to the petitioner and on service of the notice the petitioner appeared before the Mamlatdar and contested the claim of the respondent. During the pendency of the proceedings said Venkatesh expired on 29th December, 1985 and on his death his legal representatives were brought on record. On conclusion of the inquiry before the Mamlatdar, by order dated 30th September, 1993 the Mamlatdar directed the respondents to be registered as the mundkars of the petitioner in respect of the said house occupying structural area of 335 sq.m. along with W.C. Aggrieved by the said order, the petitioner preferred appeal before the Addl. Collector which came to be dismissed by the Addl. Collector by its Order dated 29th August, 19996. The matter was carried in revision before the Administrative Tribunal. However, the same was also dismissed by its Order dated 1st April, 1999. Hence the present petition.

3. The petitioner challenges the impugned orders on various grounds including the ground that the claim of the respondents under the said Act was allowed on the basis of inadmissible evidence, that the authorities failed to consider the fact that the original applicant Venkatesh had claimed the right of mundkarship vis-a-vis Agostino and not against the petitioner and therefore there was no occasion for the authorities to declare the applicant Venkatesh or his legal heirs to be the mundkars of the petitioner, that the concept of "dwelling house" as known to the said Act can extend to the area of 300 sq.m. and therefore the authorities could not have declared the respondent to be a mundkar of an area in excess thereof, that the authorities failed to consider the fact that the W.C. which is claimed to be a part of the dwelling house was situated beyond the distance of 5 metres from outer wall of the house in question, apart from the ground that the Addl. Collector while dismissing the appeal acting in a most superficial, perfunctory and arbitrary manner in not complying with the statutory obligation while dealing with the appeal against the order passed by the Mamlatdar.

4. Upon hearing the learned Advocates for the parties and on perusal of the records, the first point which arises for consideration is whether the lower appellate Court has dealt with the appeal in the manner it was required to be dealt with in accordance with the provisions of law

under the said Act and whether the said aspect has been duly considered by the Revisional Court while disposing the revision application.

5. The contention on behalf of the petitioner is that the lower Appellate Court merely by one sentence that it has perused the entire evidence on record, and without analysing the said evidence with proper application of mind, has rejected the appeal and thereby has acted in a most arbitrary manner ignoring the provisions of law comprised under the said Act regarding the procedure to be followed while dealing with an appeal under the said Act.

6. The contention on behalf of the respondents on the other hand, is that the appellate court apart from recording that it has gone through the entire evidence, has dealt with in detail the two relevant issues which were arising for consideration in the matter in view of the plea in defence raised by the petitioner and those are, one regarding the issue of tenancy and the other regarding the person who had inducted the respondent in the suit house and therefore merely because while dealing with the appeal the appellate authority had not specifically formulated the points for determination that would not be a justification to contend that the appellate court had acted arbitrarily while disposing the appeal.

7. Perusal of the Judgment passed by the lower appellate court obviously discloses reference to various submissions made on behalf of the parties as well as the case put forth by both the parties before the lower appellate authority, however, it nowhere discloses analysis of the evidence on record and more particularly with reference to the points which were required to be dealt with by the appellate court.

8. Undoubtedly, the matter related to claim of mundkarship by the respondents. The term “mundkar” has been defined in section 2(p) to mean a person who, with the consent of the bhatkar or the person acting or purporting to act on behalf of the bhatkar lawfully resides with a fixed habitation in a dwelling house with or without obligation to render any services to the bhatkar. The said provision also enumerates the instances which would disentitle a person to claim to be mundkar and includes the case where a person pays rent to the bhatkar for the occupation of the house or the person is a domestic servant or a chowkidar who is paid wages and who resides in an out-house, house-compound or other portion of his employer's residence or a person employed in a mill, factory, mine, workshop or a commercial establishment and is residing in the premises belonging to the owner or person in charge of such mill, factory, mine, workshop or commercial establishment, in connection with his employment in such mill, factory, mine, workshop or commercial establishment; or a

person residing in the whole or part of a house belonging to another person or in an out-house existing in the compound of the house, as a care-taker of the said house or for purposes of maintaining it in habitable condition. The explanation to the said section provides that a person shall be deemed to be lawfully residing with the consent of the bhatkar in a dwelling house if such person resides in it for a period exceeding one year prior to the appointed date and the bhatkar has not initiated any proceedings, during the said period of one year, to evict such person from the dwelling house, through a competent court of law, on the ground that such person was a trespasser or, having so initiated such proceedings does not succeed in obtaining a decree for the eviction of such person.

9. The ingredients of section 2(p) of the said Act, regarding definition of 'mundkar' , are required to be established by the person claiming to be a mundkar before he gets a declaration from the Court regarding his rights under the said Act. The definition essentially speaks of residence of a person in another's house with the consent of the bhatkar or person acting on behalf of the bhatkar. The term “bhatkar” has been defined under section 2(f) to mean a person who owns the land on which the mundkar has a dwelling house. The term “dwelling house” has been defined under Section 2(i) to mean the house in which mundkar resides with a fixed habitation and includes the land to the extent of five meters

around the outer walls of the dwelling house when the house is situated within the jurisdiction of Village Panchayat and two metres whn it is not within such jurisdiction. Besides option is left to the mundkar to purchase the dwelling house to the extent of 200 square metres of land when the house is situated within the jurisdiction of Municipal Council and otherwise to the extent of 300 square metres.

10. The provision clearly requires that the original authority under the said Act which is the Mamlatdar, while dealing with the claim for registration of mundkarship, has to get satisfied about the existence of all these ingredients as described in the definition clause of 'mundkar', 'bhatkar', and 'dwelling house' and based on evidence led by the parties, and based on such satisfaction has to arrive at the finding about the claim of mundkarship and only thereupon make the necessary declaration in accordance with the provisions of law. When the matter is placed before the appellate authority, the appellate authority has to deal with the appeal against the order passed by the Mamlatdar in accordance with the provisions comprised under Section 27 of the said Act. Section 27 provides that the appellate authority shall exercise the powers as are exercised by the concerned trial court, appellate court or a court exercising revisional jurisdiction, under the Code of Civil Procedure Code, 1908. Obviously all the provisions of law under the Code of Civil Procedure are to be followed

by the appellate authority while acting under the said Act and dealing with the appeal under the said Act.

11. If one peruses Order 41 of C.P.C., it elaborately lays down the procedure to be followed by an appellate Court. Rule 31 thereof clearly provides that the judgment of the Appellate Court shall be in writing and it shall states the points for determination, the decision thereon, the reasons for the decision, and where the decree appealed from is reversed or varied, the relief to which the appellant is entitled to. The said provision had been subject matter of various decisions of this Court as well as of the Apex Court. This court has clearly held that the said provision is mandatory in nature and should be complied with by the appellate court, more particularly from the point of view of not only for the benefit of the higher court dealing with the matter in further appeal so that it is in a position to know that the first appellate court, on proper application of mind and on detail analysis of the materials on record, had considered the matter, and has arrived at appropriate findings, but it will also ensure the parties to the litigation that their case has been properly considered by the first appellate Court.

12. The learned Advocate for the respondents however has drawn attention to the decision of the Apex Court in the case of ***G. Amalorpavam***

and others v. R.C. Diocese of Madurai and others, reported in **(2006) 3 SCC 224** while contending that the Apex Court has held that substantial compliance of the said provision would suffice and mere failure on the part of the appellate Court to formulate points for determination would not be justification for interference in the order of the appellate Court. The Apex Court in G. Amalorpavam (supra) while dealing with the point relating to of the obligation of the first appellate Court to comply with the provisions of Order 41 R.31 of C.P.C. has held thus :-

> The question whether in a particular case there has been substantial compliance with the provisions of Order 41 Rule 31 CPC has to be determined on the nature of the judgment delivered in each case. Non-compliance with the provisions may not vitiate the judgment and make it wholly void, and may be ignored if there has been substantial compliance with it and the higher appellate court is in a position to ascertain the findings of the lower appellate court. It is no doubt desirable that the appellate court should comply with all the requirements of Order 41 Rule 31 CPC. But if it is possible to make out from the judgment that there is substantial compliance with the said requirements and that justice has not thereby suffered, that would be sufficient. ”

13. Obviously the Apex Court in the said decision has held that it is always desirable that the appellate court should comply with the requirements of Order 41, Rule 31 C.P.C. While considering the mandate of the statutory provisions comprised under Rule 31 of Order 41 the Apex Court clearly reminded every appellate authority about its obligation to record the points for determination and thereafter to proceed to analyse the evidence on record to find out the proper answer to such points and thereupon give decision with reasons in relation to such points., while holding that even substantial compliance of such obligation would serve the purpose and in that case the judgement of the first appellate court would not stand vitiated. The term " decision " does not merely imply conclusions, but the conclusions supported by reasonings. Obviously, therefore, a decision should disclose analysis of materials on record with proper application of mind by the adjudicating authority. Being so, the fact that the authority has understood the matter which is required to be considered, must be apparent on the face of the record and for the same reason it is but natural that the authority has to formulate and record the points which are required to be considered. Further, with reference to such points, the authority has applied its mind to the matter in issue, must also be disclosed from the judgment itself and therefore the discussion should disclose the reasoning which can support the conclusions which the authority would arrive at. This being the object of Rule 31 of Order 41 of

C.P.C., though it is a matter of procedure, it needs to be meticulously complied with by the appellate authority and that is what the Apex Court has said in the said decision, while holding thus :-

> " It is no doubt desirable that the appellate court should comply with all the requirements of Order 41 Rule 31 CPC. "

Undoubtedly, in a given case, substantial compliance of the said requirement could be sufficient. However, what would be the "substantial compliance" of the mandate of Rule 31 of Order 41 of C.P.C. has also been explained by the Apex Court in the said decision as it has been held thus :-

> " Where the appellate court has considered the entire evidence on record and discussed the same in detail, come to any conclusion and its findings are supported by reasons even though the point has not been framed by the appellate court there is substantial compliance with the provisions of Order 41 Rule 31 CPC and the judgment is not in any manner vitiated by the absence of a point of determination."

14. The ruling clearly discloses that mere technical defect of non-

recording of the point for determination by itself may not be a ground for interference in the judgment passed by the first appellant court, provided that the judgment of the first appellate court should disclose detailed discussion regarding the materials on record and the findings arrived at being supported by proper reasoning. In other words, the discussion in the judgment should not only reveal mere analysis and the finding based on analysis, but should also disclose proper application of mind on consideration of the provisions of law applicable to the facts of the case by the adjudicating authority, which would reveal that the adjudicating authority was aware of the points to be determined by the appellate court. Sketchy analysis or mere reproduction of submissions or the case put forth by the parties without any analysis thereof, would not amount to discussion in detail with application of mind to the points required to be considered by the appellate authority and, therefore, would not be substantial compliance of the requirements of Order 41 Rule 31 CPC.

15. Reverting to the matter in hand, perusal of the judgment passed by the lower appellate court, undoubtedly discloses reproduction of various submissions put forth by the parties orally as well as in the form of written submissions and ultimately a statement by the appellate authority that: " I have carefully gone through the evidence on record so also the written arguments filed by the learned counsel for both the parties and come to

the conclusion that the respondents were consented to reside in the suit house by the landlord. They have fixed habitation since long and they were residing in the entire house. Therefore I have no hesitation in dismissing the above appeal and uphold the order of the learned Mamlatdar. ” In my considered opinion, this exercise by the lower appellate authority, by no stretch of imagination can be said to be disclosing detail analysis of the materials on record or recording of reasonings in terms of requirements of Order 41 Rule 31 CPC and for the same reason it cannot be said to be amounting to substantial compliance of the provisions of law. Undoubtedly, no points for determination were formulated by the lower appellate court.

16. As already observed, while dealing with appeals under the said Act, not only the original authority, but even the appellate authority has to ascertain whether all the ingredients of the definition of “mundkar” coupled with the definition of 'bhatkar' and ' dwelling house' have been satisfied by cogent evidence by the parties so as to enable the authority under the said Act to give declaration or to refuse the same in accordance with the provisions of law. Failure in that regard would amount to failure on the part of the appellate authority to comply with the provisions of Section 27 of the said Act read with Order 41 Rule 31 C.P.C.

17. The learned Advocate appearing for the respondents however drawing attention to the decision of the Apex Court in the case of ***Santosh Hazari v. Purushottam Tiwari (deceased) by LRS*** reported in **(2001) 3 SCC 179** has submitted that it was a case of mere affirmation of the order passed by the lower court and therefore it was not necessary for the lower appellate court to discuss the matter in detail. It would have been a different case if the lower appellate authority was to reverse the judgment of the lower court. Attention was drawn specifically to para 15 of the said decision of the Apex Court.

18. The decision in **Santosh Hazari's** case (supra) is essentially on the point of obligations on the appellate court reversing the judgment of the trial Court and in that regard the ratio laid down is that the appellate court affirming the judgment of the trial Court need not restate the effect of the evidence or reiterate the evidence given by the trial Court. However while reversing the judgment of the trial Court by the appellate Court, the findings of fact based on conflicting evidence arrived at by the trial court, must weight with the appellate Court, more so when the findings are based on oral evidence recorded by the same Presiding Judge who authors the judgment and secondly the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. At the

same time the Apex Court has struck a note of caution that even in case of affirming judgments of the appellate court, expression of generl agreement with the finding of the trial court should not be a device adopted by the appellate court for shirking its duty cast on it under the statutory provisions. Obviously the Apex Court has reminded the appellate court about their duties under O.41 and more particularly under R.31 C.P.C. In fact, the ruling clearly speaks of requirements of the appellate court's judgment to reflect its conscious application of mind and recording of findings supported by reasons on all the issues arising for consideration by the appellate court

19. The Apex Court in Santosh Hazari's case has held thus :-

> " The appellate court has jurisdiction to reverse or affirm the findings of the trial court. First appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. The task of an appellate court affirming the findings of the trial court is an easier one. The appellate court agreeing with the view of the trial court need not restate the effect of the evidence or reiterate the reasons given by the trial court; expression of general agreement with reasons

> given by the court, decision of which is under appeal, would ordinarily suffice. We would, however, like to sound a note of caution. Expression of general agreement with the findings recorded in the judgment under appeal should not be a device or camouflage adopted by the appellate court for shirking the duty cast on it. ”

20. It would obviously disclose that even in case of affirming judgment, the same should disclose conscious application of mind to the points which are required to be dealt with by the appellate court and the same would obviously require the appellate court to formulate the necessary points for determination and analyse the materials on record with reference to such points for determination and accordingly give its finding on the basis of such analysis. Therefore, mere reproduction of the submissions or the case of the parties and thereafter stating that the court has perused the entire evidence and that therefore does not require interference in the order of the trial court would not be sufficient compliance of the provisions of law comprised under Section 27 of the said Act read with Order 41 Rule 31 of C.P.C.

21. If one peruses the judgment of the Administrative Tribunal, indeed the point regarding failure on the part of the lower appellate authority to deal with the appeal, which was required to be dealt with was

specifically raised and it was brought to the notice of the Tribunal that the evidence was not properly analysed by the appellate court. However, the Tribunal merely observed that in revisional jurisdiction it cannot re-appreciate or reassess the evidence, and failed to consider the said point in the manner required to be considered by the revisional authority. It is true that the revisional authority cannot re-assess or re-appreciate the evidence as a matter of course. However, when the lower appellate court fails to perform its duty and the judgment passed by the lower appellate court does not disclose the necessary analysis of evidence on record and application of mind to the points which were required to be considered, obviously it would be the duty of the revisional court to deal with the said aspect and if necessary while setting aside the order of the appellate court to remand the matter for re-consideration thereof. The Tribunal appears to have totally ignored this aspect of the matter while dealing with the revision application filed by the petitioner.

22. Consequently the arbitrary exercise by the appellate authority has totally gone unnoticed by the revisional authority and rather the revisional authority has committed the same mistake which the lower appellate authority has committed in the case in hand.

23. For the reasons stated above, therefore, without going into the merits of the case and on account of failure of the lower appellate authority as well as the revisional authority to comply with the requirement of law while dealing with the appeal, both the judgments are liable to be set aside and the matter to be remanded to the lower appellate authority to deal with the appeal filed by the petitioner in accordance with the provisions of law and bearing in mind the observations made hereinabove. Needless to say that considering the fact that the appeal relates to the year 1994, the appellate authority after hearing the parties should dispose of the same within a period of four months on receipt of the writ of this Court. In case any revision application is filed by the aggrieved party against the decision of the lower appellate authority, the same should be disposed of within four months from the date of service of the notice in the revision application on the party opposite to the petitioner.

24. In the result, therefore, the petition succeeds. The impugned orders passed by the revisional authority and the lower appellate court are hereby quashed and set aside. The matter is remanded to the lower appellate court to be disposed of in accordance with the provisions of law and bearing in mind the observations made hereinabove within the time

specified as above. Rule is made absolute in the above terms with no order as to costs.

R. M. S. KHANDEPARKAR, J.

sl.